

CAAT (A)

96G138-139
Local 562

R.O. #

96-562-600
601

IN THE MATTER OF AN ARBITRATION

BETWEEN: HUMBER COLLEGE

AND: ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF THE GRIEVANCE OF LINUS CIPLIJASKAS - GRIEVANCE
#96G138.

O.B. SHIME, Q.C.	CHAIRPERSON
J. G. CAMPBELL	NOMINEE for the College
J. D. McMANUS	NOMINEE for the Union

APPEARANCES:

C.G. RIGGS	COUNSEL and others for the College
R. MURDOCK	COUNSEL and others for the Union
K.A. MacKAY and G. MAZER	ON THEIR OWN BEHALF

A hearing was held in this matter on February 11, 1997 at Toronto, Ontario.

AWARD

This matter concerns two grievances filed by the grievor in which he claims that he has been improperly laid-off.

At the commencement of the proceedings, Counsel for the College made two preliminary objections. First, he submitted that pursuant to the lay-off grievance procedure under Article 27.08B, the grievor, in the written reference to arbitration, omitted the two positions which would be the subject matter of the grievance and arbitration. The second preliminary objection concerned Step 2 of Article 32.03, which requires that there be a reference to arbitration within fifteen days of the date of the receipt by the grievor of the College's decision at Step 2. Counsel submits that requirement is a mandatory requirement under the collective agreement, since the grievance is considered to be abandoned pursuant to Article 32.05A of the collective agreement if the grievor fails to act within the time limits.

In response to the first objection, Counsel for the Union admits that it did not comply with Article 27.08B of the collective agreement, however Counsel submits that the College waived that requirement. Counsel contends that the College raised the issue of non-compliance on the eve of arbitration and that the College's silence with respect to a substantive issue for five or six months, constituted a waiver. With respect to the second issue Counsel states that there was full compliance.

Both grievances were filed on May 29th, 1996. The grievor had been provided with written notice of his lay-off by letter dated March 13th, 1996. On June 28th, 1996, the College confirmed that

it was prepared to hear the grievances at the Step 2 stage and waived the Complaint and Step 1 stage of the grievances on a "without prejudice and precedent" basis, and requested the grievor to provide further information. The College also requested an extension of time limits to respond fully to the grievances by August 16th, 1996. In a memorandum to the Union, dated August 27th, 1996, the College responded in a substantive way to both grievances, and in both cases, reserved the right to raise an objection to the timeliness of the filing of the grievances, having regard to the provisions of Article 28.08A and 32.02 of the collective agreement. On August 30th, 1996, the Union advised the College that its reply to the grievances was unsatisfactory and that it was submitting the grievances to arbitration. By letter dated October 10th, 1996, the Union referred both grievances to arbitration. In a memorandum dated January 24th, 1997, just prior to this arbitration, the Union identified two employees for displacement, for the purpose of the arbitration.

The relevant provisions of the collective agreement are as follows:

Lay-Off Grievances

27.08A An employee claiming improper lay-off, contrary to the provisions of this Agreement, shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claims entitlement to displace. The time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

27.08B If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designated in 27.08A, two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time position) who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of (i), (ii), (iii), (v), (vi), (vii) or (viii) of 27.06.

General

32.05A If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

32.05C At any Complaint or Grievance Step of the grievance procedure, the time limits imposed upon either party may be extended by mutual agreement.

Article 27.08A is a provision which specifically addresses grievances concerning improper lay-offs. Article 27.08B, which is concerned with the referral to arbitration of improper lay-off grievances, specifies that "the written referral to arbitration in 32.03 shall specify. . . , two full-time positions, or positions occupied by two or more partial load or part-time employees. . . who shall thereafter be the subject matter of the grievance and arbitration." These grievances which claim improper lay-off, fall within the provisions of Articles 27.08A and B. It is clear that positions were not designated in the written referral to arbitration as required.

The failure to designate has been canvassed in a number of cases. In Ontario Public Service Employees' Union and Canadore College, grievance of F. Mueck, December 12, 1996, (R.O. MacDowell), unreported, it was asserted that the grievor had not identified the potential targets for bumping under Article 27.08A and the College maintained that this requirement was mandatory. The Board, after canvassing the decided cases stated as follows:

"These are admittedly old cases. But they are precisely on point, no contrary authorities were cited to us, and the language in question has been maintained, without material change, since 1987, over several rounds of bargaining. Had the parties wished to change the contract language to avoid the interpretation given by arbitrators Shime and Weatherill, they could easily have done so. But they did not. On the contrary. Article 27.08B, as currently framed, merely reinforces the mandatory thrust of Article 27.08A; because 27.08B narrows the

number of positions which can ultimately be the subject of arbitral review. The matters that can proceed to arbitration are a subset of the positions identified in Article 27.08A - which makes it all the more important for the grievor to identify the field from which the arbitrable subset is selected.

In other words, the current structure of the agreement reinforces the interpretation advanced by arbitrators Shime and Weatherill ten years ago.

It follows, we think, that Mr. Mueck's grievance is fundamentally defective and therefore is not arbitrable. We agree with the College's submission in this regard."

The Union conceded that there was non-compliance with Article 27.08B but maintained that the College had waived that requirement. The Union submits that there was ongoing contact between the parties and the College did not raise the issue of non-compliance until February 6, 1997, just prior to the hearing, and that the College's silence for five or six months from the time this matter was referred to arbitration constituted a waiver. In support of its position, the Union relies on the decision of Arbitrator K.M. Burkett in The George Brown College of Applied Arts and Technology and Ontario Public Service Employees' Union, grievance of Giovanni De Simone, dated December 29th, 1995, unreported. Thus, the sole issue before this board of arbitration, on the first preliminary objection, is whether there has been a waiver of the requirement.

In The George Brown College case, the grievance did not refer to any specific position and the referral to arbitration did not identify two positions. However, Mr. T. Tomassi, a Union steward testified that during Steps 1 and 2 of the grievance procedure, two junior employees were identified, who had not been laid off and who performed the work in question. Also, the Union had provided a memorandum to the College in response to Step 1 of the grievance procedure in which the Union

stated that work was being done in the tool and die program by someone who was junior to the grievor on the seniority list and discussed that situation. The College had responded that there were teachers with less seniority, who were teaching machine shop courses, but were also teaching other courses requiring special knowledge, and that response was replied to by a memorandum from the Union which again discussed the situation in the machine shop. Based on that evidence, the Union argued that the positions in issue were identified during the grievance meeting, so that there was essential compliance and because "fresh" steps in the grievance procedure were taken after individual positions were identified, the College had waived any objection that it otherwise might have had in the manner in which the grievance was framed.

The Board of Arbitration responded to that argument as follows:

"The Union next argues that there has been essential compliance in that Mr. Tomassi advised the College as to the specific positions challenged at the first and second steps of the grievance procedure. Without at this juncture, making a finding as to whether he did or did not advise the College in this regard, we must also reject the Union's second submission. The requirement of both Articles 27.08A and B is that the identification of the positions that are challenged be in writing. This requirement is for the sound policy reason of avoiding the very type of factual dispute as has arisen in this case. An oral representation does not satisfy either the intent or the purpose of the clause. There was no written advice and, therefore, it must be found that there has not been compliance with Articles 27.08A or B. We find support for our rejection of the first two positions argued by the Union in re St. Lawrence College and OPSEU (supra)."

It is clear from that case that a failure to designate constitutes non-compliance with the grievance arbitration procedure.

The Board of Arbitration went on to discuss whether the matter was procedural or substantive and then raised the question as to whether there had been a waiver by the College. The Board stated as follows:

“The question is, therefore, whether the College waived reliance upon the requirements of Articles 27.08A & B. In answering this question it is important to remember that Articles 27.08.A & B are interrelated in their operation. All of the challenged positions are to be named under Article 27.08A and, of these, two are to be identified in the referral to arbitration under Article 27.08B. Against the backdrop of this interrelationship between the two Articles we make the finding that Mr. Tomassi identified the challenged positions (specifically those occupied by Messrs. Young and Hatter) at steps one and two of the grievance procedure. The correspondence supports Mr. Tomassi in that it makes clear that the Union made a presentation on the basis that “this work is currently being taught by someone who is junior to Mr. DeSimone on the seniority list” (May 5, 1994 Memo from Union challenging Colleges April 29 minutes of first step meeting) and that “Management did acknowledge that there were teachers with less seniority who are teaching machine shop courses. . .” (Management response to step 2 meeting May 24, 1994) furthermore, notwithstanding Mr. Tomassi's assertion that he identified the two positions and the correspondence that establishes that the focus of the discussion was the continued employment of teachers with less seniority, no one was called by the College to dispute Mr. Tomassi's assertion.

We are satisfied that although the grievance did not identify specific challenged positions these were identified orally at the grievance hearing and the matter was allowed to proceed from step one to step two without objection from the College. Clearly, therefore, the Article 27.08A requirement was waived by the College and we hereby so find. The matter was then referred to arbitration without specifying in writing the two positions that had been identified orally in the grievance procedure. Having waived the Article 27.08A requirement and having been advised orally of the positions in issue, the College, if it wished to rely upon the Article 27.08B requirement, should have made a prompt objection upon the referral to arbitration. The referral to arbitration is dated June 15, 1994. The College did not object until February 1995; some eight months later. Whereas the College argues that the first opportunity it had to object was at the time the hearing was reconvened, we disagree. These parties are in an on-going

relationship. They deal with each other on a variety of issues on a continuous basis. In this context it cannot be said that the first opportunity to object was at the hearing. An objection could have been made (and in this case should have been made) upon receipt of the referral. Silence implies acceptance especially in circumstances where the Article 27.08A requirement had already been waived and where the silence extended beyond the time as of which the objection could be made without requirement the granting of an adjournment. Accordingly, in the face of the challenged positions having been identified orally, the College's waiver of the Article 27.08A requirement and its eight month silence following the referral to arbitration, we are compelled to find that the College also waived its reliance upon the Article 27.08B requirement. For the purposes of certainty the Union is to advise the College in writing forthwith of two positions that it is claiming.”

In our view the factual situation in this case is clearly distinguishable. It is apparent from the decision in The George Brown College case that there was a continuing waiver. The arbitrator found that the challenged positions were identified at the grievance hearing under the Step 1 procedure and that the Article 27.08A requirement was waived by the College during the grievance procedure. The learned arbitrator further found that having waived the requirement, during the grievance procedure, that the College was obliged to make a prompt objection upon the referral to arbitration and did not. The Board concluded *“silence implies acceptance, especially in circumstances where the Article 27.08A requirement had already been waived and where the silence extended beyond the time as of which the objection could be made without requiring the granting of an adjournment.”* (Emphasis added) It was the combination of the early waiver of the Article 27.08A requirement and the silence following the eight months referral to arbitration that compelled the arbitrator to conclude that the College had waived reliance on the 27.08B requirement.

In this case, however, while there appeared to be some reference to names in the original

grievance, no evidence was called and there was no suggestion and no argument that there was a waiver during the grievance procedure. Counsel for the Union, in this matter, relies solely on the time between the referral to arbitration and the date of arbitration as suggesting that there has been a waiver. The George Brown College case is clearly distinguishable because there had been a waiver during the grievance procedure. That Board's conclusion that Article 27.08A had already been waived coupled with the silence that extended beyond the referral to arbitration, in that Board's view, constituted a waiver. In our view, the mere silence between the time of the referral to arbitration and the raising of this matter at arbitration cannot constitute a waiver as that term is generally understood. Despite the ongoing contact between the parties, and absent any evidence in these circumstances that this matter was discussed, it appears that the time of the hearing was the first opportunity that the College had to raise this matter, and it did. The College cannot be faulted for its silence between the time the matter was referred to arbitration and the raising of the preliminary objection at the outset of the hearing. Its silence per se, in these circumstances does not constitute a waiver. Accordingly, the College's preliminary objection is allowed.

In view of our decision with respect to the first objection, it is not necessary to deal with the second preliminary object. The grievances are dismissed.

DATED AT TORONTO THIS 21st DAY OF MAY, 1997.

O.B. Shime

O.B. SHIME, Q.C.
CHAIRMAN

"I concur"

J. CAMPBELL
NOMINEE FOR THE COLLEGE

"Partial dissent" - attached

J.D. McMANUS
NOMINEE FOR THE UNION

PARTIAL DISSENT

The grievor filed two grievances, the first alleging a breach of Article 27.06 and the second alleging a breach of Article 27.05 and 2. On the first day of hearing the College brought two preliminary motions seeking to have the grievances dismissed without a hearing. First, the College alleged that the Union had failed to comply with its 27.08(B) obligation to identify the full-time, part-time, or partial load employees whose work the grievor claims. Second, the College alleged that the Union had engaged in a series of delays under Article 32.

I dissent from the majority decision in so far as it fails to address the grievance filed under Article 2. That "Staffing" Article states that the College "will give preference to the designation of full-time positions as regular continuing teaching positions" over partial-load teaching positions (2.02) and sessional appointments (2.03). Nowhere in this Article is there a requirement to identify individuals upon referral to arbitration. In dismissing both grievances the majority has imported the section 27.08(B) requirement into Article 2.

There is considerable case law on Article 2 alone, and the issues in those decisions are quite distinct from the lay-off issues under Article 27. So are the remedies: the former could require the College to post a full-time position(s) (as per OPSEU and Humber College, Robert Howe, April 1994, *unreported*), while under the latter the grievor, if successful, would be awarded a position already in existence.

Union counsel made it clear in her opening that there were two distinct grievances, one a lay-off grievance under Article 27 and the other a Staffing grievance under Article 2. Accordingly, in my view, the majority erred in importing section 27.08(B) requirements into Article 2. I would have allowed the Union an opportunity to prove its Article 2 allegations.

UNION NOMINEE

John Mc Manus.
JOHN MC MANUS.